IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1844

UNION ELECTRIC COMPANY,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

Petitioner Union Electric Company respectfully prays that a Writ of Certiorari be issued to review the amended judgment of the United States Court of Appeals for the Eighth Circuit entered in this case as of February 20, 1979. A Petition for Rehearing With Suggestion That the Case Be Reheard by the Court En Banc was denied on March 15, 1979.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, which was entered on February 20, 1979, is re-

ported at 593 F(2) 299 (advance sheet of April 30, 1979) and is printed as Appendix A.

JURISDICTION

The amended judgment of the United States Court of Appeals for the Eighth Circuit, which was entered as of February 20, 1979, is printed as Appendix B; and Union Electric Company's Petition for Rehearing With Suggestion That the Case Be Reheard by the Court En Banc was denied by an Order entered March 15, 1979 and printed as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED

Does the due process clause of the Fifth Amendment to the United States Constitution, as interpreted and applied by this Court in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908) and subsequent decisions, protect a person from incurring the risk of severe and confiscatory civil and criminal penalties for violations of SO_2 provisions in the Missouri implementation plan,[1] while he is legally testing the validity of the application to him of those provisions and when his actual SO_2 emissions present no danger to the public health or welfare?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution says that:

[1] References to such implementation plan are to the plan as approved by the United States Environmental Protection Agency (EPA).

> "No person shall . . . be deprived of life, liberty or property without due process of law . . ."

Section 113(a), (b) and (c) of the Clean Air Act, as amended (42 U.S.C. Section 7413(a), (b) and (c))—the "Act"—sets forth enforcement and penalty provisions and is, therefore, pertinent to this petition. It is printed as Appendix D.

STATEMENT OF THE CASE

In this suit, which was filed in the Federal District Court at St. Louis, Missouri, on February 8, 1978, petitioner Union Electric Company sought a declaratory judgment and a preliminary and permanent injunction prohibiting the EPA from enforcing against the Company and its responsible corporate officers SO_2 emission regulations in the implementation plan during the time the Company was seeking an appropriate revision to that part of the plan.[2] The Company asserted that the requested relief stemmed from the due process clause in the Fifth Amendment to the United States Constitution, as interpreted by this Court in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908) and later decisions. Consequently jurisdiction of the Federal District Court was properly based on the Federal Question Act (28 U.S.C. Sec. 1331) and the Declaratory Judgment Act (28 U.S.C. Sec. 2201).

The Complaint alleges that the implementation plan's SO_2 emission regulation, which applies to the Company's Labadie

[2] Pursuant to Supreme Court Rule 21.1 and by a letter dated May 4, 1979, counsel for petitioner Union Electric Company requested the Clerk of the United States Court of Appeals for the Eighth Circuit to certify and transmit the record in this case to the Supreme Court. Such counsel was advised by a letter dated May 8, 1978 from said Clerk that the Clerk of the Supreme Court had directed him not to forward such Record unless and until so requested by the Supreme Court. In view of the foregoing, this Petition does not include citations to such Record.

and Sioux power plants, is more stringent than necessary to maintain Federal (and Missouri) Ambient Air Quality Standards; and it further alleges that more relaxed emission regulations would permit the maintenance of those standards. In support of such allegations, the Complaint states that the Company and the EPA itself had on several occasions determined that the actual SO_2 emissions from those plants would not prevent the maintenance of such Air Quality Standards[3] and that a relaxation of the SO_2 emission regulations by the Missouri Air Commission would be proper.[4]

As the Complaint alleged, on January 13, 1978, the EPA issued to the Company a Notice of violations of the Clean Air Act, as amended. This Notice which was sent pursuant to Section 113(a)(1) of the Act, listed four Labadie units and two Sioux units as in violation of this unduly stringent SO_2 regulation. The Notice pointed out that if any of these violations continued more than 30 days after such Notice the EPA was required by the Act to commence a civil suit for a permanent or temporary injunction or to assess a civil penalty of not more than $25,000 per day of violation or both. (See Section 113(b) of the Act).[5]

Section 113(c)(1) of the Act also provides criminal penalties for any person who knowingly continues a violation more than 30 days after the EPA Notice. Since there was no question

[3] One of the EPA determinations had been made in response to an Act of Congress—the Energy Supply and Environmental Coordination Act of 1974, which amended Section 110(a)(3)(B) of the Clean Air Act.

[4] At the hearing on the preliminary injunction, the Company presented evidence in support of these allegations, as well as evidence in support of the other allegations of the Complaint.

[5] While this "requirement of a civil suit extends only to a "major stationary source" everyone agrees that Labadie and Sioux are major stationary sources (See Appendix A, p. A-9).

but that Union Electric officers knew the Company's Labadie and Sioux plants violated the emission regulation, the Company and its responsible corporate officers[6] would be subject to such criminal penalties, if any violation so continued.

The criminal penalties for the first offense are a fine of up to $25,000 per day of violation or imprisonment for up to one year or both. After the first conviction the fine goes to $50,000 and imprisonment to two years.[7]

On February 3, 1978, the EPA indicated in a conference with Union Electric personnel that it would commence civil enforcement proceedings without awaiting the result of legal proceedings, which the Company was then, and for over a year had been, pursuing for the purpose of obtaining an appropriate revision of the implementation plan.[8]

The Company alleged in its Complaint that it was physically impossible to discontinue such violations within the 30 day period or a considerable time thereafter without shutting down the Labadie and Sioux plants.[9] The shutting down of those plants would result in dropping over 50% of the Company's base electrical load and would be an enormous hardship to the people of the St. Louis Metropolitan Area. Additionally, it would constitute a grave danger to the entire Mid-west.

[6] Section 113(c)(3) of the Act says that the term "person" insofar as criminal penalties are concerned, includes any "responsible corporate officer." As stated in the Complaint, no Union Electric officers were joined, since no one knew the scope of the phrase "responsible corporate officer". However, an offer was there made to join the Company's officers as party plaintiffs.

[7] Section 113(c)(1) of the Act.

[8] See Appendix A, p. A-9.

[9] While the Court of Appeals opinion (Appendix A, p. A-10) generally covers these allegations, it failed to mention the allegation that FGD equipment is not a shelf item and that its installation requires about five years.

Since the only choice the Company and its responsible officers had was to bring about this catastrophe or run the risk of the severe civil and criminal penalties we have mentioned, the Company sought a declaratory judgment and injunction prohibiting EPA enforcement while it was pursuing (through administrative and, if need be judicial, proceedings) an appropriate revision to the implementation plan. And as we mentioned earlier, no question of public health was involved since the Air Standards were then being, and would continue to be, maintained regardless of the fact that the Company's Labadie and Sioux plants were not meeting the implementation plan regulation.

The Company alleged irreparable injury and inadequacy of legal remedies and it sought and obtained a preliminary injunction, limited, however, to State proceedings. But that preliminary injunction no longer constitutes the only aspect of this case, because in addition to reversing such injunction the opinion of the 8th Circuit directed (Appendix A, p. A-3) and its amended judgment ordered (Appendix B) the dismissal of the entire Complaint. No doubt that dismissal was occasioned by the fact that the 8th Circuit did not consider the Complaint as affording any basis for relief. Our petition for certiorari seeks review of this amended judgment of the 8th Circuit.

REASONS FOR GRANTING THE WRIT

We respectfully submit that the requested writ should be granted because the Court of Appeals decided the federal question presented to it in a way in conflict with applicable decisions of this Court.[10] The pertinent federal question is whether the due process clause in the Fifth Amendment to the United States Constitution protects a person from incurring the risk of severe and confiscatory civil and criminal penalties as a condition to legally testing the validity of the application to him of federal administrative regulations. And as we previously pointed out, the Ambient Air Standards are being and will continue to be maintained. Thus no one could rightly claim that the public health or welfare would be endangered during the testing period.

We submit that the decision of this Court in *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908) and its later decisions approving the principle there established[11] squarely hold that a person is constitutionally so protected. The decision of the Court of Appeals in the instant case is in conflict with the *Young* decision and abrogates the principle there established. We respectfully submit that if a constitutional principle, which has been established by this Court, is to be abrogated or modified it should be done by this Court, not by a Court of Appeals. Therefore we urge that the requested writ be granted.

Before returning to the precise point in this case, we believe that an essential, though perhaps somewhat corollary, point should be mentioned.[12] We do not believe that any United

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[10] See Supreme Court Rule 19.1(b).

[11] See, for instance *Wadley Southern Railway Company v. Georgia*, 235 U.S. 651, 35 S.Ct. 214, 218 (1915) and *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 40 Sup.Ct. 338, 340 (1920).

[12] The Court of Appeals felt the same way, since this "corollary" point was covered in its opinion (Appendix A, pp. A-16-17).

States Court or citizen would question the proposition that it would be unconstitutional to apply a Federal Administrative regulation to a person, which would confiscate his property and place him in prison, when such application was not in furtherance of the public health or welfare. And the quest by the Court of Appeals for a forum in which petitioner could present and be heard on the constitutionality of such an application constitutes a concession of this principle (See Appendix A, pp. A-16 and 17)

While the Court of Appeals said that the proper forum was the Federal District Court (where we already were), it further said that the only federal proceeding in which such a constitutional right could be raised, heard and considered was an enforcement proceeding brought by the EPA.[13] Its conclusion to that effect was not based upon any decision of this Court. To the contrary this Court stated at the end of footnote 18 of its decision in *Union Electric Company v. EPA*, 427 U.S. 246, 268, 96 Sup.Ct. 2518, 2531 (1976) that it was not addressing this question.

The Court of Appeals conclusion as to the forum and the nature of the proceeding for raising the constitutional question was based on its previous decision in *Lloyd A. Fry Roofing Co. v. United States EPA* (8th CCA 1977), 554 F(2) 885, 891.[14] And it further attempted to buttress that conclusion by a post-argument letter from the Department of Justice Attorney

[13] The Court's intimation (Appendix A, pp. 11 and 16) that a state court would be a proper forum can hardly be taken seriously. We do not believe that a state court has jurisdiction to enjoin a Federal Agency from taking enforcement action under a Federal Statute in a Federal Court. (See Section 113(b) of the Act.)

[14] The *Fry* case was not commenced in the District Court until after the enforcement proceeding was underway and an EPA abatement order had been issued. Thus, it could be said that Fry had passed up his opportunity to obtain the relief we are here seeking. Additionally the 8th Circuit did not mention in its *Fry* opinion the constitutional principle on which we rely.

representing the EPA (Appendix A, p. A-17). Assuming the propriety and strength of such authority, we read that letter as stating that in the opinion of the Assistant Attorney General who wrote the letter questions of constitutionality and validity *cannot* be raised in an enforcement proceeding (Appendix A, p. A-17).[15]

On this general point we mention finally the contention gingerly but oft advanced that raising a constitutional point in a Court (even though the Court is not permitted to hear or consider it) satisfies constitutional requirements. Of course, this contention is a patent denial of constitutional rights.

Turning directly to the precise point of this case, the Court of Appeals seems to place some reliance for its holding on a letter dated September 13, 1978, from the "Director, Enforcement Division, EPA Region VII" to Petitioner.[16] We respectfully submit that this letter is untenable from the standpoints of purpose, scope and legality.[17] As a matter of fact, the 8th Circuit itself expressed some question about its "legality" (Appendix A, p A-16, footnote 8).

As we stated at the outset of this part of our petition, the specific federal question is whether the Federal Constitution

[15] Such an opinion would accord with the opinion stated on page 68 of the Report of the House Committee on Interstate and Foreign Commerce concerning the Clean Air Act Amendments of 1977 (H.R. Report 95-294, 95th Congress, 1st Session, dated May 27, 1977). This report was also submitted to the 8th Circuit in a post-argument letter but was not mentioned in its opinion.

[16] See Appendix A, p. A-16 and its footnote 8. This letter, which, among a number of other things, purports to grant a "limited administrative reprieve", got into the case through the procedure of the Assistant Attorney General attaching a copy of it to his Reply Brief in the 8th Circuit.

[17] Certainly a letter from personnel in an EPA regional office could hardly be thought a defense to a citizen's suit brought under Section 304(a)(2) of the Act to compel the EPA Administrator to enforce emission standards in the implementation plan.

protects a person from the risk of severe and confiscatory penalties while legally testing the validity of the application to him of Federal Administrative Regulations although during the testing process there is no danger to the public health or welfare.

The decision in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908), which we consider in point, is discussed and quoted in the Court of Appeals opinion (Appendix A, pp. A-3 and 15). Consequently we do not repeat it here. The principle there established was subsequently explained in the decision of *Wadley Southern R. Co. v. Georgia*, 235 U.S. 651, 35 S.Ct. 214, 218 (1915) as follows:

> "These cases do not proceed upon the idea that there is any want of power to prescribe penalties heavy enough to compel obedience to *administrative orders*, but they are all based upon the fundamental proposition that under the Constitution penalties cannot be collected if they operate to deter an interested party from testing the validity of legislative rates or orders legislative in their nature. Their legality is not apparent on the face of such orders, but depends upon a showing of extrinsic facts. A statute, therefore, which imposes heavy penalties for violation of commands of an unascertained quality is, in its nature, somewhat akin to an ex post facto law, since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position *where he himself must, at his own risk, pass upon the question*. He must either obey what may finally be held to be a void order, or disobey what may ultimately be held to be a lawful order. If a statute could constitutionally impose heavy penalties for violation of commands of such disputable and uncertain legality, the result inevitably would be that the carrier would yield to void orders, rather than *risk* the enormous cumulative or confiscatory punishment that *might* be imposed if they should thereafter be declared to be valid." (emphasis added).

The foregoing quotation is inserted because it clearly demonstrates (1) that this principle applies to administrative action (with which we are here confronted) as well as to legislative enactments, and (2) that the constitutional protection is against the *risk* of incurring severe penalties, not against the necessity or certainty that they will in fact be incurred.

The Court of Appeals distinguishes the *Young* decision on the ground that Union Electric will be able to test this part of the implementation plan in an enforcement proceeding "without *necessarily* incurring confiscatory fines and penalties" (Appendix A, p. A-15).[18] The decision of the 2nd Circuit in *Brown & Williamson Tobacco Corp. v. Engman*, 527 F(2) 1115 (1975), *cert. denied*, 426 U.S. 911, 96 S.Ct. 2237 is the only authority the 8th Circuit cites in support of its statement.

Following the above quoted statement in the 8th Circuit opinion, the Court says that the EPA Administrator has the alternative of either seeking injunctive relief or imposing civil or criminal penalties. We do not know whether the Court is implying that injunctive relief does not come under the category of "severe and confiscatory penalties". But if that is its intent, we respectfully submit that there are few things more confiscatory than compelling a person to shut down his plant because he is physically unable to comply with an unsupportable regulation.[19]

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[18] In the event a point were to be made about it, everyone agrees that there was no real opportunity for a testing during the formulation or EPA approval of the initial implementation plan (See Section 110(a)(1) and (2) of the Act. 42 U.S.C. Section 7410(a)(1) and (2)). Additionally circumstances have changed materially since this 1972 approval.

[19] On the question of confiscation, see this Court's discussion of the Company's dilemma in that part of the *Young* opinion which is quoted by the 8th Circuit at p. A-14 of Appendix A.

However, this is not the real point of our case. The constitutional protection is against the *risk* of incurring severe and confiscatory fines and penalties, not the certainty or necessity that they will in fact be assessed. Of course we all know that for one reason or another this result may never happen, and this Court so indicated in its *Young* and *Wadley* opinions.

Before moving on, we believe it proper to finish that part of the *Brown & Williamson* opinion from which the 8th Circuit obtained the phrase "without *necessarily* incurring confiscatory fines and penalties." The immediately following sentence says

> "The Constitutional requirement is satisfied by a statutory scheme which provides an opportunity for testing the validity of the statutes or administrative orders without incurring the *prospect* of debilitating or confiscatory penalties." (emphasis added—527 F(2) at p. 1119.)

We submit that this is an accurate statement of the constitutional requirement and that such requirement was not met in the instant case.

As the 8th Circuit Court of Appeals pointed out (Appendix A, pp. A-11 and 12), Section 113(b) of the Act says that

> "In determining the amount of any civil penalty to be assessed under this subsection, the courts shall take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation."

This possibility of judicial grace does not apply to suits for injunctive relief or criminal penalties. Certainly such a limited, statutory possibility of judicial grace, or even an inherent judicial grace, does not dispense with constitutional requirements. American Jurisprudence has taught us that the Due Process

clause in the Fifth Amendment applies to all three branches of our Federal Government.[20]

In conclusion we refer briefly to a part of the earlier opinion of this Court in *Union Electric Company v. EPA*, 427 U.S. 246, 266-7, 96 Sup.Ct. 2518, 2529-2530 (1976). The Court there said:

> ". . . we do not hold that claims of infeasibility are never of relevance in the formulation of an implementation plan or that sources unable to comply with emission limitations must inevitably be shut down.
>
> "Perhaps the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan. So long as the national standards are met, the State may select whatever mix of control devices it desires, . . . and industries with particular economic or technical problems may seek special treatment in the plan itself. . . . Moreover, if the industry is not exempted from, or accommodated by, the original plan, it may obtain a variance, as petitioner did in this case; and the variance, if granted after notice and a hearing, may be submitted to the EPA as a revision of the plan. . . . Lastly, an industry denied an exemption from the implementation plan, or denied a subsequent variance, may be able to take its claims of economic or technological infeasibility to the the state courts. . . ."

As Union Electric's complaint alleges, shortly after this suggestion from the Supreme Court the Company followed it by filing a petition with the Missouri Air Conservation Commission seeking an appropriate change in the existing SO_2 regulations. In doing so and in pursuing such request, neither the Company nor its responsible corporate officers believed they

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[20] See *Hovey v. Elliot*, 167 U.S. 409, 17 S. Ct. 841, 844-5 (1897).

were incurring the risk of severe and confiscatory penalties, and perhaps even being met with the prospect of continuing their quest after fines had been imposed and collected and while responsible corporate officers were serving penitentiary sentences. We are confident that if any member of this Court had thought that such a risk existed he would have mentioned it. But none did.

CONCLUSION

For the reasons set forth above, we respectfully pray that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the Eighth Circuit, Entered on February 20, 1978 and Reported at 593 F.2d 299 (Advance Sheet of April 30, 1979)

UNION ELECTRIC COMPANY,
Appellee,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Appellant.

No. 78-1357.

United States Court of Appeals,
Eighth Circuit.

Submitted Nov. 16, 1978.

Decided Feb. 20, 1979.

Rehearing and Rehearing En Banc

Denied March 15, 1979.

Environmental Protection Agency appealed from a judgment of the United States District Court for the Eastern District of Missouri, Roy W. Harper, Senior District Judge, 450 F.Supp. 805, which enjoined it from instituting an enforcement proceeding under the Clean Air Act against an electric utility. The Court of Appeals, Heaney, Circuit Judge, held that Environmental Protection Agency was not subject to injunction prohibiting it from instituting enforcement proceeding under Clean Air Act against electric company or its officers even though the company was actively and in good faith pursuing a revision or variance of sulfur dioxide regulations of the Missouri Implementation

Plan in administrative agencies and/or courts of State of Missouri.

Reversed.

1. Health and Environment Key 28

Question of whether noncomplying polluter may continue operations without change if such change is not technologically or economically feasible may be raised in enforcement proceeding instituted by Environmental Protection Agency under Clean Air Act. Clean Air Act Amendments of 1977, § 101 et seq., 42 U.S.C.A. § 7401 et seq.

2. Health and Environment Key 28

Environmental Protection Agency was not subject to injunction prohibiting it from instituting enforcement proceeding under Clean Air Act against electric company or its officers even though company was actively and in good faith pursuing revision or variance of sulfur dioxide regulations of Missouri Implementation Plan in administrative agencies and/or courts of State of Missouri. Clean Air Act Amendments of 1977, § 101 et seq., 42 U.S.C.A. § 7401 et seq.

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Martin Green, Atty., Dept. of Justice, Washington, D. C., for appellant; Sanford Sagalkin, Deputy Asst. Atty. Gen., Washington, D. C., Robert D. Kingsland, U. S. Atty., Joseph B. Moore, Asst. U. S. Atty., St. Louis, Mo., George R. Hyde, Barbara Brandon, Attys. Dept. of Justice, Washington, D. C., on the brief; Joan Z. Bernstein, Gen. Counsel, Ronald C. Hausmann,

Atty., Environmental Protection Agency, Washington, D. C., of counsel.

Before LAY and HEANEY, Circuit Judges, and HANSON,* Senior District Judge.

HEANEY, Circuit Judge.

The Environmental Protection Agency appeals from a judgment of the United States District Court for the Eastern District of Missouri which enjoined the EPA from instituting an enforcement proceeding under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, against the Union Electric Company or its officers while that Company is actively and in good faith pursuing a revision or variance of the sulfur dioxide (SO_2 regulations of the Missouri Implementation Plan in the administrative agencies and/or courts of the State of Missouri. We reverse the judgment of the District Court and direct that the complaint of Union Electric be dismissed.

Union Electric serves the metropolitan St. Louis area and parts of Illinois and Iowa. Its three coal-fired generating plants, Labadie, Meramec and Sioux, are subject to the SO_2 and opacity restrictions in the Missouri Implementation Plan as approved by the EPA on May 31, 1972.

Union Electric did not seek review of the approved Missouri Implementation Plan within thirty days as it was entitled to do under § 307(b)(1) of the Act, 42 U.S.C. § 1857h-5(b)(1).[1]

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* WILLIAM C. HANSON, United States Senior District Judge for the Southern District of Iowa, sitting by designation.

[1] Section 307(b)(1) was revised by the Clean Air Act Amendments of 1977, Pub.L. No. 95-95, 91 Stat. 685 (1977), and the new version of this section now appears at 42 U.S.C. § 7607. We note that in *Union Electric Co. v. EPA*, 427 U.S. 246, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976), the Supreme Court held that questions of economic or technological infeasibility cannot be raised in proceedings under this section. *Id.* at 265-266, 96 S.Ct. 2518.

It did, however, obtain one-year variances from the appropriate state and county agencies which eased the emission limitations affecting its three plants. The variances for two of the three plants had expired and Union Electric was applying for extensions when, on May 31, 1974, the Administrator of the EPA notified the Company that the SO_2 emissions from its plants violated the emission limitations contained in the Missouri Implementation Plan, and advised it of the probability that enforcement proceedings would soon be instituted.

On August 18, 1974, Union Electric sought review in this Court, contending that the SO_2 emission regulations contained in the Missouri Implementation Plan were economically and technologically infeasible and that its emissions were not interfering with attainment or maintenance of the National Ambient Air Quality Standards (NAAQS). We held that the claims of infeasibility did not afford a basis for review under § 307(b)(1) of the Act, 42 U.S.C. § 1857h-5(b)(1), and dismissed Union Electric's petition for lack of jurisdiction. *Union Electric Co. v. Environmental Pro. Agcy.*, 515 F.2d 206 (8th Cir. 1975).

Our decision was affirmed by the Supreme Court on October 6, 1975. *Union Electric Co. v. EPA*, 427 U.S. 246, 96 S.Ct. 2518, 49 L.Ed.2d 474 (1976). In that opinion, the Supreme Court stated:

> [C]laims of economic or technological infeasibility may not be considered by the Administrator in evaluating a state requirement that primary ambient air quality standards be met in the mandatory three years. * * * [T]he States may submit implementation plans more stringent than federal law requires and * * *the Administrator must approve such plans if they meet the minimum requirements of § 110(a)(2), * * * [thus] the language of § 110(a)(2)(B) provides no basis for the Administrator ever to reject a state implementation plan on the ground that it is economically

> or technologically infeasible. Accordingly, a court of appeals reviewing an approved plan under § 307(b)(1) cannot set it aside on those grounds, no matter when they are raised.
>
> Our conclusion is bolstered by recognition that the Amendments do allow claims of technological and economic infeasibility to be raised in situations where consideration of such claims will not substantially interfere with the primary congressional purpose of prompt attainment of the national air quality standards. Thus, we do not hold that claims of infeasibility are never of relevance in the formulation of an implementation plan or that sources unable to comply with emission limitations must inevitably be shut down.
>
> Perhaps the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan. So long as the national standards are met, the State may select whatever mix of control devices it desires, * * * and industries with particular economic or technological problems may seek special treatment in the plan itself. * * * Moreover, if the industry is not exempted from, or accommodated by, the original plan, it may obtain a variance, as petitioner did in this case; and the variance, if granted after notice and a hearing, may be submitted to the EPA as a revision of the plan. § 110(a)(3)(A), as amended, 88 Stat. 256, 42 U.S.C. § 1857c-5(a)(3)(A) (1970 ed., Supp. IV.) Lastly, an industry denied an exemption from the implementation plan, or denied a subsequent variance, may be able to take its claims of economic or technological infeasibility to the state courts. See, e. g., § 203.130, Mo[.] Rev[.] Stat[.] (1972); Cal[.] Health & Safety Code § 39506 (1973); Pa[.] Stat[.] Ann[.] Tit. 71, § 1710.41 (1962). (Citations and footnotes omitted, and emphasis added.)

Id. at 265-267, 96 S.Ct. at 2529-30.

Union Electric petitioned the Supreme Court for a rehearing, which was subsequently denied. The Regional Administrator for EPA wrote a letter to the chairman of the Missouri Air Quality Commission, which stated in part:

> The EPA has reviewed the SO_2 monitoring data for the area around three UECO plants and performed some diffusion modeling calculations. The results of this review and these calculations indicates [sic] that UECO was correct in the contention that its SO_2 emissions were not interfering with the attainment or maintenance of the NAAQS for SO_2.
>
> * * * * * * *
>
> The EPA has no objections to your amending Regulation X to relax the SO_2 emission standard for the three UECO plants which were mentioned previously. The new SO_2 emission standard must still provide for attainment and maintenance of the NAAQS and this must be demonstrated by a revision to the Control Strategy Section of the Missouri State Implementation Pan.
>
> If you decide not to follow the above course of action or place the UECO on a compliance schedule to comply with Regulation X, the EPA has no alternative but to issue an Administrative Order, pursuant to Section 113 of the Clean Air Act, which requires the UECO to comply with the SO_2 emission standard specified by Regulation X. This enforcement action is necessary because the EPA cannot allow an emission source to violate an emission standard in a federally approved SIP [State Implementation Plan] unless there is an approved expeditious compliance schedule.
>
> Because of the seriousness and magnitude of this problem, it is imperative for the Missouri Air Conservation Commission (MACC) and the EPA to be on the same wave length. I will be looking forward to hearing from you on any decisions the MACC may make. If we can help, let me know.

In September, 1976, Union Electric filed a petition with the Missouri Air Conservation Commission for a relaxation of the existing regulations for SO_2, or, in the alternative, for a variance from existing regulations for the Company's plants. In April, 1977, the Commission tabled the Company's request to change the existing SO_2 emission limitations and denied the Company's request for a variance for its St. Louis plant. The Commission indicated, however, that it would consider the Company's petition for variances for the Sioux and Labadie plants. A representative of the EPA was present and indicated agreement with that procedure.[2] Variance petitions for the Sioux and Labadie plants were filed by the Company in September, 1977.

On November 11, 1977, the Regional Administrator of the EPA wrote a letter to the Director of the Missouri Division of Environmental Quality which stated, in pertinent part:

> Based on inspections conducted by the Environmental Protection Agency in the Fall of 1976, the Portage Des Sioux and Labadie power plants are both in violation of the SO_2 emission limitation in the approved Missouri Implementation Plan. As you know, Union Electric petitioned the Missouri Air Conservation Commission in the Fall of 1976 for a relaxation of the existing regulation for SO_2 or, in the alternative, for a variance from the existing regulation for the individual Union Electric plants. The Commission voted not to change the SO_2 emission limitations for the St. Louis metropolitan area, but indicated they would

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[2] A variance shall be considered as a revision of the State Implementation Plan and approved as such by the EPA if, in addition to meeting procedural requirements, it will not prevent the maintenance of National Air Quality Standards. *Train v. Natural Resources Def. Council*, 421 U.S. 60, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975).

consider the company's petition for a variance for the Sioux and Labadie plants.

In a letter to you dated May 31, 1977, Mr. Charles V. Wright, Acting Regional Administrator, stated that since the Commission had voted not to change the SO_2 emission limitation in the St. Louis regulation, the State was expected to act promptly to either bring the Union Electric plants into compliance with the existing limitation or to adopt and justify less stringent limitations in accordance with Federal requirements. Five months have passed and the State has yet to take any action with regard to the Labadie and Sioux power plants.

* * * * * * *

I have asked my staff to inspect the Union Electric Meremac [sic], Sioux, and Labadie plants within the next forty-five (45) days to verify and formally document their current status of compliance with all applicable emission limitations in the State plan. If these sources are found to be in violation, this office will be required to take appropriate action under Sections 113(a)(1) and 113(b) of the Act in the absence of any formal action by the Commission on the Union Electric variance petitions.

On January 13, 1978, the EPA notified Union Electric of its alleged violations of the SO_2 and opacity standards of the Missouri Implementation Plan. The EPA stated that Union Electric's Labadie and Sioux power plants were in violation of SO_2 and opacity regulations, and that the Meramec plant was in violation of opacity regulations.[3] The notice invited Union Electric to a conference to discuss the violations, and set forth the

[3] Prior to this date, the Meramec plant started using low sulfur coal which resulted in that plant being in compliance with the SO_2 emission limitation.

statutory responsibilities of the Agency if the matter was not resolved within thirty days.[4]

On February 3, 1978, the EPA held the conference with Union Electric. At this conference, the EPA indicated that it would commence enforcement proceedings without waiting for the decision of the Missouri Commission on the Company's request for variances for its plants. The EPA indicated that it was required to proceed with enforcement by § 111(b) of the Clean Air Act Amendments of 1977, 42 U.S.C. § 7413(b)(2)(B).

On February 8, 1978, Union Electric brought this action in federal District Court for the Eastern District of Missouri, seeking a declaratory judgment and temporary and permanent injunctive relief. It simultaneously sought action by the State of Missouri on its variance requests.

[4] This notice stated, in relevant part:

> Section 113(b) of the Clean Air Act, as extensively revised by the recent 1977 Clean Air Act Amendments, now provides that whenever any person violates a requirement of an applicable implementation plan more than 30 days after having been notified of the violation, the Administrator shall, in the case of a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both. A major stationary source is defined as any source which directly emits or has the potential to emit, one hundred tons per year or more of any air pollutant. The Administrator may also issue an order to require immediate compliance under Section 113(a) or an order specifying a delayed compliance date in accordance with specific requirements of Section 113(d) of the criminal penalties in certain cases.
>
> In accordance with Section 113(a)(4) of the Act, we are offering you an opportunity for a conference to discuss the violations which are the subject of this Notice. The conference will afford Union Electric an opportunity to present information upon the findings of violation, on the nature of the violations, on any prior efforts made to achieve compliance or on steps the company has taken or will take to comply with the applicable regulations.

On March 16, 1978, the District Court granted the preliminary injunction requested by Union Electric 450 F.Supp. 805. The court found: (1) that Union Electric was in the unenviable position of having daily penalties for noncompliance with the Missouri Implementation Plan accrue while it sought variances pursuant to the statutorily authorized procedure contained in Mo.Ann.Stat. § 203.110 (Vernon); (2) that the failure of Union Electric to comply with any governmental directive could constitute an act of default under its first mortgage and deed of trust and make its bonds callable, and that a calling of the bonds could force it into brankruptcy; (3) that compliance with the SO_2 regulations is not possible because compliance can be achieved only by installing flue gas desulfurization (FGD) equipment at an initial cost of $713 million and annual operating costs of $137 million, that the FGD equipment could not be relied upon to operate continually or satisfactorily, that the use of low sulfur coal as an alternative was not possible because the annual cost of such coal would be $179 million per year and would require a capital investment of $49 million, resulting in a rate increase of twenty-five percent, assuming that there was no reduction in the use of electricity, and that, in any event, it was impossible to obtain a sufficient supply of low sulfur coal to meet the SO_2 emission regulations; (4) that compliance with SO_2 regulations could be achieved only by a shutdown of the Union Electric plants which would result in a widespread electrical breakdown throughout the Midwest and drastic financial consequences to Union Electric; (5) that the injury to the EPA was not substantial because Union Electric's plants did not violate the National Air Quality Standards for SO_2; and (6) that Union Electric had a substantial likelihood of success on the merits because the Missouri Air Conservation Commission had informally indicated it would approve the variance.

The court concluded that: (1) considerations of procedural due process required that Union Electric be permitted to seek

a variance under state procedures for SO_2 emissions[5] prior to suffering a grievous loss which may result from an enforcement proceeding by the EPA; (2) that it had the general equitable power to stay an enforcement proceeding to prevent irreparable harm while Union Electric seeks the variances, in good faith, under state procedures; and (3) that the only fair interpretation of the Clean Air Act is to allow the variance proceeding to proceed to completion prior to the initiation of an enforcement action. This appeal was filed on May 15, 1978.

On July 26, 1978, more than two months after this appeal was filed, the Missouri Air Conservation Commission granted the variance in the SO_2 standards requested by Union Electric for its Sioux and Labadie plants. A petition to review that variance was subsequently filed in the Circuit Court of Cole County, Missouri, by the Coalition for the Environment and by the State of Illinois. That action is still pending.

In *Lloyd A. Fry Roofing Co. v. United States E.P.A.*, 554 F.2d 885 (8th Cir. 1977), we held that pre-enforcement judicial review of an abatement order on grounds of technological or economic infeasibility is inconsistent with the enforcement mechanism established by Congress in the Clean Air Act. Senior Judge M. C. Matthes, writing for the Court, pointed out that a company seeking to have these issues reviewed could do so in state court, or could present its cause as a defense to any enforcement proceedings initiated by the EPA in federal district court. He also noted that if the Agency seeks retroactive civil penalties, a company can protect itself by invoking the equitable doctrine of laches if the Agency failed to promptly seek enforcement.[6] *Id.* at 891 & n.4.

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[5] Union Electric concedes that the District Court did not enjoin the EPA from enforcing opacity regulations.

[6] Civil or criminal penalties are not required by the Act. The Administrator may seek injunctive relief instead. 42 U.S.C. § 7413(b). If the Administrator seeks a civil penalty, the court is required to

Union Electric would have us distinguish *Fry* on the grounds that the plaintiff in *Fry* sought pre-enforcement review of an EPA compliance order while, here, it seeks only a temporary stay of any enforcement action which may be undertaken by the EPA pursuant to the notice of violation while a state variance from the emission limitations is sought.

Certainly this case cannot be distinguished from *Fry* on the grounds that *Fry* involved a compliance order and this case involves a notice of violation. If an abatement order may not be the subject of an anticipatory lawsuit enjoining its enforcement, then surely a notice of violation, which is a procedural prerequisite to an abatement order, may not be the subject of such a suit.[7]

Nor can it be distinguished from *Fry* on the grounds that *Fry* involved an attempt to obtain a pre-enforcement decision in Federal court on the merits of the Missouri Implementation Plan, while here, the attempt is only to secure a temporary stay of any further enforcement procedures while the Company is actively and in good faith pursuing a revision of the SO_2 emission regulations in state administrative agencies or courts. This distinction, of course, exists. However, it is not one which permits us to reach a result different than that which was reached in *Fry*. Section 7413(b) specifically requires the Administrator to commence a civil action for injunctive relief or for the

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take into consideration "(in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation." *Id.*

[7] If a violation of the Act continues unabated for more than thirty days after issuance of a notice of violation, the Agency may either (1) immediately commence a civil action for injunctive or other relief; or (2) issue a compliance order, which is not effective until after an informal administrative conference. Under the second alternative, if the order issued by the Agency is not met within the specific time or informal efforts to abate prove unsatisfactory, the Agency is authorized to initiate an action in district court to compel compliance. 42 U.S.C. § 7413(a),(b).

assessment of civil or criminal penalties thirty days after notice of violation has been given to a major stationary source. One purpose of this section is to require the states to act promptly in granting or denying variance requests. This purpose would be thwarted if federal courts were permitted to remove the pressures that Congress clearly thought necessary to accomplish the objectives of the Clean Air Act. The heart of the decision in *Fry* is that federal courts should not interfere with the pre-enforcement procedures established by the Act to obtain compliance. *Fry* recognized that Congress intended the 1970 Amendments to the Clean Air Act to "expedite the implementation and enforcement of air quality standards" and that the Amendments were " 'a drastic remedy to what was perceived as a serious and otherwise uncheckable problem.' " *Id.* at 889, 891.

No case could better illustrate the need for expeditious enforcement than this one. The Missouri Implementation Plan was approved on May 31, 1972. Now, nearly seven years later, Union Electric is still not in compliance with the plan's SO_2 emissions limitations at its Labadie or Sioux plants, and the State of Missouri has yet to finally approve or disapprove its request for a variance from existing standards.

This statement of fact is not necessarily intended to point the finger at Union Electric, the State of Missouri or the EPA. All have been responsible in one way or another for the delays that have occurred. It is only to emphasize that we can only be faithful to the mandate of Congress if we require strict adherence to the procedural routes which it established for bringing clean air to the nation.

In *Fry*, we did not consider a contention by Union Electric which was deemed important by the District Court, *i. e.*, that Union Electric has a due process right to contest the validity of the emission standard without necessarily having to face

ruinous penalties if it loses its action. The District Court relied on *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L. Ed. 714 (1908), in so holding. In *Young*, the State of Minnesota enacted a number of statutes which established minimum rates which could be charged by railroads within the State and which fixed penalties for the railroads' failure to comply. Railroad officials contended that the statutes were invalid because the penalties imposed were so severe that no company official would run the risk of violating the statutes in order to test their validity. The Supreme Court sustained their contention. It stated:

> Another Federal question is the alleged unconstitutionality of these acts because of the enormous penalties denounced for their violation, which prevent the railway company, as alleged, or any of its servants or employees, from resorting to the courts for the purpose of determining the validity of such acts. The contention is urged by the complainants in the suit that the company is denied the equal protection of the laws and its property is liable to be taken without due process of law, because it is only allowed a hearing upon the claim of the unconstitutionality of the acts and orders in question; at the risk, if mistaken, of being subjected to such enormous penalties, resulting in the possible confiscation of its whole property, that rather than take such risks the company would obey the laws, although such obedience might also result in the end (though by a slower process) in such confiscation.
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> . . . . .
>
> [W]hen the penalties for disobedience are by fines so enormous and imprisonment so severe as to intimidate the company and its officers from resorting to the courts to test the validity of the legislation, the result is the same as if the law in terms prohibited the company from seeking judicial construction of laws which deeply affect its rights.

> Now, to impose upon a party interested the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can be determined only after investigation of a very complicated and technical character, and the ordinary case of statute upon a subject requiring no such investigation, and over which the jurisdiction of the legislature is complete in any event.

Id. at 144-145, 148, 28 S.Ct. at 447-449. *See also St. Regis Paper Co. v. United States*, 363 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961); *Oklahoma Operating Co. v. Love*, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596 (1920); *Wadley S. R. Co. v. Georgia*, 235 U.S. 651, 35 S.Ct. 214, 59 L.Ed. 405 (1915).

We do not believe *Young* to be applicable here. Union Electric has an opportunity to test the validity of the Missouri Implementation Plan without *necessarily* incurring confiscatory fines and penalties. *See Brown & Williamson Tobacco Corp. v. Engman*, 527 F.2d 1115 (2d Cir. 1975), *cert. denied*, 426 U.S. 911, 96 S.Ct. 2237, 48 L.Ed.2d 837 (1976). The Administrator of the EPA, as we pointed out in note 6, *supra*, has two alternatives. He can either seek injunctive relief or can seek to impose civil or criminal penalties. We should not anticipate what the Administrator will seek in advance of his decision. Thus, it cannot be said that confiscatory fines and penalties will *necessarily* be incurred. Indeed, the Administrator apparently feels, in this case, that he has a third alternative—that of staying

enforcement until the resolution of Union Electric's variance request.[8]

Union Electric makes a corollary argument that it must, at some point, have a forum in which to raise its contention that compliance with the Missouri Implementation Plan is economically and technologically infeasible, and that denial of such a forum results in its property being taken without due process of law. Without ruling on the merits of this issue, the Supreme Court stated in *Union Electric Co. v. EPA, supra,* that such a forum is available to alleged violators because contentions of economic and technological infeasibility can be raised in state court. *Union Electric Co. v. EPA, supra,* 427 U.S. at 266-267, 96 S.Ct. 2518. *See also West Penn Power Company v. Train,* 522 F.2d 302, 311-313 (3d Cir. 1975), *cert. denied,* 426 U.S. 947, 96 S.Ct. 3165, 49 L.Ed.2d 1183 (1976). Moreover, this Court held in *Fry* that such issues can be raised as a defense in an enforcement proceeding.[9] *Lloyd A. Fry Roofing Co. v. United States E.P.A., supra* at 891. The EPA conceded at oral argument that these issues can be raised in an enforcement proceeding. It affirmed that position in a post-argument memorandum which states:

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[8] On September 13, 1978, the EPA notified Union Electric that it will not initiate any enforcement proceedings against that Company with respect to its alleged violations of the existing SO_2 emission limitations until the Regional Administrator of the EPA has informed Union Electric, in writing, of its decision regarding a recommended approval or disapproval of the variance. The Company was further notified that if EPA's Regional Office recommended approval, the enforcement stay would be extended until such time as the Administrator of EPA has taken final action on the variance request. This notification would also appear to eliminate any risk that the Company's bonds would be called for failure to follow a governmental directive. We express no opinion as to whether this stay is authorized by the Act.

[9] In *Union Electric Co. v. EPA, supra,* 427 U.S. at 268 n. 18, 96 S.Ct. 2518, the Supreme Court declined to decide whether questions of economic and technological infeasibility can be raised in an enforcement proceeding.

> Our position remains that, as was stated in *Union Electric v. Environmental Protection Agency,* 427 U.S. 246, 268 [96 S.Ct. 2518, 49 L.Ed.2d 474] (1976), "claims of technological or economic infeasibility * * * are relevant to fashioning an appropriate compliance order under § 113 (a)(4)". And, of course, when a compliance order becomes the subject of an enforcement proceeding, then those same claims may be considered by the courts. Concededly, the Supreme Court, in footnote 18 of the *Union Electric* decision, *supra* at page 268 [96 S.Ct. 2518], expressly declined to address the question whether economic or technological infeasibility may be raised as a defense in civil or criminal enforcement proceedings. In our opinion, however, the correct rule must be that while such matters may not be raised in defense when the purpose of the defense is to contest the validity or constitutionality of an order, they may be raised as matters to be considered where the object of the proceeding is to fashion a schedule and plan which a company can comply with.

[1,2] We cannot, of course, read more into *Fry* or into the EPA's concession than was intended. We do not now hold that the Clean Air Act will ultimately permit a non-complying polluter to continue operations without change if such change is not technologically or economically feasible. We do hold, however, that this question can be raised in any future enforcement proceeding, and that Union Electric at that time will be able to argue that Congress did not intend that result or that, if it was intended, the statute is unconstitutional.[10] We reserve our decision on that issue until it is properly presented to us.

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[10] Mr. Justice Powell, concurring in *Union Electric Co. v. EPA, supra* at 271-272, 96 S.Ct. at 2532, stated:

> Environmental concerns, long neglected, merit high priority, and Congress properly has made protection of the public health its paramount consideration. * * * But the shutdown of an urban area's electrical service could have an even more serious impact on the health of the public than that created by a decline in

We reaffirm our decision in *Lloyd A. Fry Roofing Co. v. United States E.P.A., supra*, and reverse the District Court. Any other course of action would be inconsistent with the enforcement mechanism which Congress has established in the Clean Air Act and would unreasonably delay achieving the objectives of that Act.

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ambient air quality. The result apparently required by this legislation in its present form could sacrifice the well-being of a large metropolitan area through the imposition of inflexible demands that may be technologically impossible to meet and indeed may no longer even be necessary to the attainment of the goal of clean air.

I believe that Congress, if fully aware of this Draconian possibility, would strike a different balance.

APPENDIX B

Amended Judgment of the United States Court of Appeals for the Eighth Circuit Entered as of February 20, 1979

United States Court of Appeals
For the Eighth Circuit

No. 78-1537 September Term, 1978

Union Electric Company, Appellee,

v.

Environmental Protection Agency, Appellant.

AMENDED JUDGMENT

APPEAL FROM the United States District Court for the Eastern District of Missouri.

THIS CAUSE came on to be heard on the original designated record of the United States District Court for the Eastern District of Missouri and briefs of the respective parties and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed and that the complaint of Union Electric be dismissed.

February 20, 1979

APPENDIX C

Order of the United States Court of Appeals for the Eighth Circuit, Dated March 15, 1979, Denying the Petition for Rehearing

United States Court of Appeals
For the Eighth Circuit

78-1357 September Term, 1978

Union Electric Company, Appellee,

v.

Environmental Protection Agency, Appellant,

Appeal from the United States District Court for the Eastern District of Missouri

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

March 15, 1979

APPENDIX D

Section 113(a), (b) and (c) of the Clean Air Act, as Amended (42 U.S.C. Section 7413(a), (b) and (c))

(a)(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any requirement of an applicable implementation plan, the Administrator shall notify the person in violation of the plan and the State in which the plan applies of such finding. If such violation extends beyond the 30th day after the date of the Administrator's notification, the Administrator may issue an order requiring such person to comply with the requirements of such plan or he may bring a civil action in accordance with subsection (b) of this section.

(2) Whenever, on the basis of information available to him, the Administrator finds that violations of an applicable implementation plan are so widespread that such violations appear to result from a failure of the State in which the plan applies to enforce the plan effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the 30th day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such plan (herafter referred to in this section as "period of federally assumed enforcement"), the Administrator may enforce any requirement of such plan with respect to any person—

(A) by issuing an order to comply with such requirement, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of

section 7411(e) of this title (relating to new source performance standards), section 7412(c) of this title (relating to standards for hazardous emissions), or section 119(g) (relating to energy-related authorities) is in violation of any requirement of section 7414 of this title (relating to inspections, etc.), he may issue an order requiring such person to comply with such section or requirement, or he may bring a civil action in accordance with subsection (b) of this section.

(4) An order issued under this subsection (other than an order relating to a violation of section 7412 of this title) shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation. A copy of any order issued under this subsection shall be sent to the State air pollution control agency of any State in which the violation occurs. Any order issued under this subsection shall state with reasonable specificity the nature of the violation, specify a time for compliance which the Administrator determines is reasonable, taking into account the seriousness of the violation and any good faith effort to comply with applicable requirements. In any case in which an order under this subsection (or notice to a violator under paragraph (1) is issued to a corporation, a copy of such order (or notice) shall be issued to appropriate corporate officers.

(5) Whenever, on the basis of information available to him, the Administrator finds that a State is not acting in compliance with any requirement of the regulation referred to in section 129(a)(1) of the Clean Air Act Amendments of 1977 (relating to certain interpretative regulations) or any plan provisions required under section 7410(a)(2)(I) of this title and part D of this subchapter, he may issue an order prohibiting the construction or modification of any major stationary source in any area to which such provisions apply or he may bring a civil action under subsection (b)(5) of this section.

Violations by owners or operators of major stationary sources

(b) The Administrator shall, in the case of any person which is the owner or operator of a major stationary source, and may, in the case of any other person, commence a civil action for a permanent or temporary injunction, or to assess and recover a civil penalty of not more than $25,000 per day of violation, or both, whenever such person—

(1) violates or fails or refuses to comply with any order issued under subsection (a) of this section; or

(2) violates any requirements of an applicable implementation plan (A) during any period of Federally assumed enforcement, or

(B) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section of a finding that such person is violating such requirements; or

(3) violates section 7411(e) of this title, section 7412(c) of this title, section 119(g) (as in effect before August 7, 1977), subsection (d)(5) of this section relating to coal conversion) section 7620 of this title (relating to cost of certain vapor recovery), section 7419 of this title (relating to smelter orders) or any regulation under part B of this subchapter (relating to ozone);

(4) fails or refuses to comply with any requirement of section 7414 of this title or subsection (d) of this section; or

(5) attempts to construct or modify a major stationary source in any area with respect to which a finding under subsection (a)(5) of this section has been made.

The Administrator may commence a civil action for recovery of any noncompliance penalty under section 7420 of this title or for recovery of any nonpayment penalty for which any person

is liable under section 7420 of this title or for both. Any action under this subsection may be brought in the district court of the United States for the district in which the violation occurred or in which the defendant resides or has his principal place of business, and such court shall have jurisdiction to restrain such violation, to require compliance, to assess such civil penalty and to collect any noncompliance penalty (and nonpayment penalty) owed under section 7420 of this title. In determining the amount of any civil penalty to be assessed under this subsection, the courts shall take into consideration (in addition to other factors) the size of the business, the economic impact of the penalty on the business, and the seriousness of the violation. Notice of the commencement of such action shall be given to the appropriate State air pollution control agency. In the case of any action brought by the Administrator under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to the party or parties against whom such action was brought in any case where the court finds that such action was unreasonable.

Penalties

(c)(1) Any person who knowingly—

(A) violates any requirement of an applicable implementation plan (i) during any period of Federally assumed enforcement, or (ii) more than 30 days after having been notified by the Administrator under subsection (a)(1) of this section that such person is violating such requirement, or

(B) violates or fails or refuses to comply with any order under section 7419 of this title or under subsection (a) or (d) of this section.

(C) violates section 7411(e) section 7412(c) of this title; or

(D) violates any requirement of section 119(g) (as in effect before August 7, 1977) subsection (b)(7) or (d)(5) of section 7420 of this title (relating to noncompliance penalties or any requirement of part B of this subchapter (relating to ozone).

shall be punished by a fine of not more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after the first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter; shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment or not more than six months, or by both.

(3) For the purpose of this subsection, the term "person" includes, in addition to the entities referred to in section 7602(e) of this title, any responsible corporate officer.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1844

UNION ELECTRIC COMPANY,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

SUPPLEMENTARY APPENDIX

to

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
for the Eighth Circuit

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To the United States Court of Appeals for the Eighth Circuit

SUPPLEMENTARY APPENDIX

Opinion of the United States District Court for the Eastern District of Missouri, Entered on March 16, 1978 and Reported at 450 F. Supp. 805

Union Electric Company, a Missouri Corporation, Plaintiff,

v.

Environmental Protection Agency, an agency of the United States of America, Defendant.

No. 78-164C(A).

United States District Court, E. D. Missouri, E. D.

March 16, 1978.

Electric utility brought action seeking declaratory judgment, preliminary injunction and permanent injunction with respect to enforcement proceedings by Environmental Protection Agency. The District Court, Harper, J., held that: (1) under its general equitable powers, the court had authority to stay EPA enforcement proceedings to prevent irreparable harm while electric utility sought in good faith a variance under state procedures, where utility established irreparable harm through potential calling of its bonds, which could force it into bankruptcy, and threatened enforcement of daily accumulating criminal and civil penalties, including an injunction not to violate regulation which could only be accomplished by closing of plant, and (2) as matter of procedural due process, electric utility was entitled to seek such a variance.

Preliminary injunction granted.

1. Injunction key 132

General function of preliminary injunction is to maintain status quo pending determination of action on its merits.

2. Injunction key 136(3), 137(1, 2, 4)

Traditional requirements necessary for grant of temporary injunction are: irreparable harm to petitioner unless preliminary relief is granted; absence of substantial harm to opposing party; absence of harm to public interests; and likelihood that petitioner will prevail on merits of his case .

3. Health and Environment key 28

District court, under its general equitable powers, had authority to stay EPA enforcement proceedings to prevent irreparable harm while electric utility sought in good faith a variance under state procedures with respect to clean air standards,

where utility established irreparable harm through potential calling of its bonds, which could force it into bankruptcy, and threatened enforcement of daily accumulating criminal and civil penalties, including an injunction not to violate regulation which could only be accomplished by closing of plant. V.A.M.S. § 393.130, subd. 1; Clean Air Act, § 113(b, c) as amended 42 U.S.C.A. § 7413(b, c).

4. Health and Environment key 28

Persons seeking to relax state emission standards more stringent than those required by national standards must obtain their relief from the state. Clean Air Act, § 101 et seq. as amended 42 U.S.C.A. § 7401 et seq.

5. Constitutional Law key 318(1)

Due process requires a full and fair hearing before impartial tribunal at meaningful time and in meaningful manner. U.S. C.A.Const. Amend. 5.

6. Constitutional Law key 305(2)

Hearing which comports with due process requirements must ordinarily be accorded before party can be condemned to suffer grievous loss. U.S.C.A.Const. Amend. 5.

7. Constitutional Law key 296(1)

As a matter of procedural due process, electric utility was entitled to seek variance of applicable state regulations contained in state implementation plan prior to enforcement proceedings by EPA with regard to emission standards for sulphur dioxide and opacity under Clean Air Act. U.S.C.A.Const. Amend. 5; Clean Air Act, § 101 et seq. as amended 42 U.S. C.A. § 7401 et seq.

8. States key 4.12

States, which are required to formulate, subject to EPA approval, an implementation plan designed to achieve national ambient air quality standards, are permitted to go beyond national standards by enacting more strict state standards. Clean Air Act, § 110(a)(1), (a)(3)(A), (a)(5)(A)(iii) as amended 42 U.S. C.A. § 7410(a)(1), (a)(3)(A), (a)(5)(A)(iii); V.A.M.S. §§ 203.-040, subd. 1, 203.110.

9. Health and Environment key 28

Under Clean Air Act, where enforcement proceeding may be instituted while the polluter is seeking a variance of state implementation plan, a variance proceeding must be allowed to go first with enforcement action to follow. Clean Air Act, § 101 et seq. as amended 42 U.S.C.A. § 7401 et seq.

William H. Ferrell, Schlafly, Griesedieck, Ferrell & Toft, St. Louis, Mo., for plaintiff.

Joseph B. Moore, Asst. U. S. Atty., St. Louis, Mo., for defendant.

MEMORANDUM OPINION AND ORDER

HARPER, District Judge.

The plaintiff, Union Electric Company (hereinafter referred to as UE), has filed a complaint seeking a declaratory judgment and a preliminary injunction and permanent injunction with respect to enforcement proceedings by Environmental Protection Agency (hereinafter referred to as EPA) with regard to emission standards for sulphur dioxide (hereinafter referred to as SO_2) and opacity under the Clean Air Act, 42 U.S.C. § 7401 et seq. Plaintiff's prayer seeks equitable relief, a stay of any

enforcement proceedings by EPA only so long as UE is actively and in good faith pursuing revisions and/or variance of the applicable regulations contained in the Missouri Implementation Plan before administrative agencies and/or courts of the State of Missouri. Plaintiff seeks no relief beyond the time at which its request for revisions are finally resolved by the administrative agencies and/or courts of the State of Missouri. Plaintiff does not ask the Court to determine the merits of its requests for revisions or the applicability of the Implementation Plan to its present operations.

This matter is before the Court on plaintiff's motion for a preliminary injunction.

The jurisdiction of this Court exists pursuant to 28 U.S.C. § 1331(a) inasmuch as this is an action brought against EPA, an agency of the United States.

There is no dispute between the parties with respect to the facts presented. The pleadings, briefs of the parties, testimony and exhibits before the Court, and prior history, disclose that the plaintiff is an electric utility company serving the metropolitan St. Louis area and parts of Illinois and Iowa. Its three coal-fired generating plants, Labadie, Meramec and Sioux, are subject to the SO_2 and opacity restrictions in the Missouri Implementation Plan as approved by EPA.

UE did not seek review of the Administrator's approval of the plan on May 31, 1972, 40 CFR 52.1320, within thirty days, as it was entitled to do under Section 307(b)(1) of the Act, 42 U.S.C. § 1857h-5(b)(1), but rather applied to the appropriate state and county agencies for variances from the emission limitations affecting its three plants. UE received a one-year variance for each of the plants which could be extended upon reapplication. The variances on two of the three plants had expired and plaintiff was applying for extensions when on May 31, 1974,

the Administrator notified the plaintiff that SO_2 emissions from its plants violated the emission limitations contained in the Missouri Implementation Plan.

On August 18, 1974, UE brought suit against the EPA in the United States Court of Appeals for the Eighth Circuit, contending that they should not have to comply with SO_2 emission regulations because of economic reasons and because their SO_2 emissions were not interfering with attainment or maintenance of the National Ambient Air Quality Standards (NAAQS) for SO_2. Therein, UE contended that a claim or economic or technological infeasibility may be considered upon a petition for review of approval by the Administrator of a state implementation plan. In *Union Electric Co. v. EPA*, 515 F.2d 206 (8th Cir. 1975), the Court held that questions of economic and technological feasibility do not constitute grounds for review and that the court is without jurisdiction to consider the claim raised by UE in its petition for review. On October 6, 1975, the Supreme Court in *UE v. EPA*, 427 U.S. 246, 265-67, 96 S.Ct. 2518, 2529, 49 L.Ed.2d 474 (1976) held:

> "In sum, we have concluded that claims of economic or technological infeasibility may not be considered by the Administrator in evaluating a state requirement that primary ambient air quality standards be met in the mandatory three years. And, since we further conclude that the States may submit implementation plans more stringent than federal law requires and that the Administrator must approve such plans if they meet the minimum requirements of § 110 (a)(2), it follows that the language of § 110(a)(2)(B) provides no basis for the Administrator ever to reject a state implementation plan on the ground that it is economically or technologically infeasible. Accordingly, a court of appeals reviewing an approved plan under § 307(b)(1) cannot set it aside on those grounds, no matter when they are raised.

> "Our conclusion is bolstered by recognition that the Amendments do allow claims of technological and economic infeasibility to be raised in situations where consideration of such claims will not substantially interfere with the *primary congressional purpose of prompt attainment of the national air quality standards. Thus, we do not hold that claims of infeasibility are never of relevance in the formulation of an implementation plan or that sources unable to comply with emission limitations must inevitably be shut down.*
>
> "Perhaps the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan. So long as the national standards are met, the State may select whatever mix of control devices it desires, *Train v. NRDC*, supra, 421 U.S. 60, at 79 [95 S.Ct. 1470, 43 L.Ed.2d 731,] and industries with particular economic or technological problems may seek special treatment in the plan itself. Cf. 40 CFR §§ 51.2(b), (d) (1975); S. Rep. No. 91-1196, p. 36 (1970). Moreover, if the industry is not exempted from, or accommodated by, the original plan, it may obtain a variance, as petitioner did in this case; and the variance, if granted after notice and a hearing, may be submitted to the EPA as a revision of the plan.[15] § 110 (a)(3)(A), as amended, 88 Stat. 256, 42 U.S.C. § 1857c-5(a)(3)(A) (1970 ed., Supp. IV.) *Lastly, an industry denied an exemption from the implementation plan, or denied a subsequent variance, may be able to take its claims of economic or technological infeasibility to the state courts.* See, e.g., § 203.130, Mo.Rev.Stat. (1972); Cal. Health & Safety Code § 39506 (1973); Pa.Stat.Ann., Tit. 71, § 1710.41 (1962).[16]" (Emphasis added.)

In February, 1975, while the case of *UE v. EPA* was in the Eighth Circuit Court of Appeals, the U. S. Environmental Pro-

tection Agency filed a report titled "Implementation Plan Review as required by the Energy Supply and Environmental Coordination Act" (Plff's Ex. 2). On page 4 of the report the EPA had this to say in part:

> "The State Implementation Plan for Missouri has been reviewed for the most prevalent causes of over-restrictive fuel combustion emission limiting regulations. The major findings of the review are:
>
> "* * * For sulfur dioxide, there are indications that emission limiting regulations for very large fuel burning sources may be overly-restrictive.
>
> * * * * * * * *
>
> "Missouri has direct fuel combustion regulations for SO_2 only in the Metropolitan St. Louis Area. Except in St. Louis, therefore, fuel switching is not hindered by SO_2 emissions regulations. Current air quality sampling data for St. Louis indicate high isolated SO_2 concentrations in the Missouri portion of the metropolitan area. However, sources of SO_2 other than power plants are in the immediate vicinity of these 'hot spots'. Since these sources are presently meeting existing emission regulations, there are strong indications that regulations affecting these sources must be tightened."

The report continues on page 5:

> "There are currently no indications that SO_2 emissions from power plants in the Missouri portion of the St. Louis area are causing violations of SO_2 air quality standards."

The Supreme Court handed down its decision in *UE v. EPA* on June 25, 1976. UE filed a motion for rehearing. On July 22, 1976, following the Supreme Court's decision, Jerome H. Svore, Regional Administrator for EPA, wrote a letter to the Chairman

of the Missouri Air Quality Commission (Plff's Ex. 3), which stated in part as follows:

> "The EPA has reviewed the SO_2 monitoring data for the area around three UECO plants and performed some diffusion modeling calculations. The results of this review and these calculations indicates that UECO was correct in the contention that its SO_2 emissions were not interfering with the attainment or maintenance of the NAAQS for SO_2
>
> "The EPA sent a letter to Governor Christopher S. Bond on March 28, 1975, a copy of which you have, transmitting a copy of a report entitled 'Implementation Plan Review for Missouri as Required by the Energy Supply and Environmental Coordination Acts.' This report stated that the State of Missouri could relax the SO_2 emission standard which applies to the three UECO plants mentioned previously, without violating the ambient air quality standards.
>
> "The EPA has no objections to your amending Regulation X to relax the SO_2 emission standard for the three UECO plants which were mentioned previously. The new SO_2 emission standard must still provide for attainment and maintenance of the NAAQS and this must be demonstrated by a revision to the Control Strategy Section of the Missouri State Implementation Plan.
>
> "If you decide not to follow the above course of action or place the UECO on a compliance schedule to comply with Regulation X, the EPA has no alternative but to issue an Administrative Order, pursuant to Section 113 of the Clean Air Act, which requires the UECO to comply with the SO_2 emission standard specified by Regulation X. This enforcement action is necessary because the EPA cannot allow an emission source to violate an emission standard in a federally approved SIP unless there is an approved expeditious compliance schedule.

"Because of the seriousness and magnitude of this problem, it is imperative for the Missouri Air Conservation Commission (MACC) and the EPA to be on the same wave length. I will be looking forward to hearing from you on any decisions the MACC may make. If we can help, let me know."

In September, 1976, after receipt of the Supreme Court decision, but before the motion for rehearing was overruled on October 4, 1976, UE filed a petition with the Missouri Air Conservation Commission for a relaxation of the existing regulations for SO_2 or in the alternative for a variance from the existing regulations for the individual UE plants. UE secured expert witnesses and prepared to submit evidence to support the petition.

The Missouri Air Conservation Commission in April, 1977, tabled the request of UE to change the SO_2 emission limitation (testimony of witness Smith), or voted not to change the SO_2 emission limitations for the St. Louis metropolitan area (Plff's Ex. 4), but indicated it would consider the Company's petition for a variance for the Sioux and Labadie plants. A Mr. Sanderson, a representative of the EPA, was present and indicated such would be agreeable.

There was a later meeting attended by representatives of the Commission, EPA and UE with respect to the problem, in which it was stated a variance would be granted. Plaintiff's Exhibit 6, a copy of a letter written by Charles V. Wright, Acting Regional Administrator, sent to James P. Odendahl, P.E., Acting Director of the Division of Environmental Quality, dated May 31, 1977, subsequent to the above occurrence states in part:

"I am pleased to respond to Mr. Michael T. Marshall's letter of May 28, 1977, regarding the Commission's intent to grant a variance to Union Electric (UE) for the operation

of their Portage Des Sioux and Labadie power plants. You requested information on the requirements regarding the approvability of a variance by the Environmental Protection Agency (EPA) as a revision to the State Implementation Plan (SIP)."

The letter sets out various information with respect to the applicable statutory and regulatory requirements. In the first paragraph on page 3 of the letter, it is stated as follows:

"Since the Commission has now voted not to change the SO_2 emission limitations in the St. Louis regulations, I will expect the State to act promptly to bring the UE plants into compliance with the existing limitations or to adopt and justify less stringent limitations in accordance with Federal requirements."

UE has complied with the SO_2 requirements at the Meramec plant by burning low sulphur coal, but in doing so has reduced the efficiency of existing particulate controls and gone out of compliance with the state and county particulate and visible emission regulations.

On November 11, 1977, Kathleen Q. Camin, Regional Administrator of EPA, wrote a letter to James P. Odendahl, Director of the Division of Environmental Quality (Plff's Ex. 4). The letter in part states:

"As you know, Union Electric petitioned the Missouri Air Conservation Commission in the fall of 1976 for a relaxation of the existing regulation for SO_2 or, in the alternative, for a variance from the existing regulation for the individual Union Electric plants. The Commission voted not to change the SO_2 emission limitations for the St. Louis metropolitan area, but indicated they would consider the company's petition for a variance for the Sioux and Labadie plants."

"In a letter to you dated May 31, 1977, Mr. Charles V. Wright, Acting Regional Administrator, stated that since the Commission had voted not to change the SO_2 emission limitation in the St. Louis regulation, the State was expected to act promptly to either bring the Union Electric plants into compliance with the existing limitation or to adopt and justify less stringent limitations in accordance with Federal requirements. Five months have passed and the State has yet to take any action with regard to the Labadie and Sioux power plants."

During all of this period the UE stood ready to present testimony to support its petition for relaxation of existing regulations or for variance, but the Commission has not acted upon the petition.

Thereafter, the Missouri Commission set a hearing for February 13, 1978, on said application, and then over the objection of UE reset the hearing for March 6, 1978.

On January 13, 1978, after the hearing before the Missouri State Commission had been set, EPA sent notices of violation to UE (Plff's Ex. 1). In the notice, the EPA charged the UE Labadie and Sioux power plants with violation of SO_2 and opacity regulations, and also charged the Meramec plant with violation of opacity regulations. 10 CSR 10-5.110(2) and 10 CSR 10-5.090. These regulations are contained in the Missouri Implementation Plan as approved by the EPA. The notice further pointed out certain penalties and injunctions shall be invoked thirty days after notification of violation. Indeed, § 113(b) of the Clean Air Act, as revised by the 1977 amendments, now provides that whenever any person violates a requirement of an applicable implementation plan for more than thirty days after having been notified of the violation, the Administrator shall, in the case of a major stationary source commence a civil action for a permanent or temporary injunction

or to assess and recover a civil penalty of $25,000 per day of violation. 42 U.S.C. § 7413(b)(2)(B). Additionally, any person who knowingly violates any requirement of an applicable implementation plan more than thirty days after having been notified of its violation by the Administrator is subject to criminal action involving a penalty of $25,000 per day of violation, or by imprisonment of not more than one year or both. Such a criminal action may be brought against both the company and its "responsible officers." 42 U.S.C. § 7413(c)(3), 42 U.S.C. § 7413(C)(1)(A)(ii). Each of UE's power plants involved herein are major stationary sources as defined in § 302(j) of the Act, 42 U.S.C. § 7602(j).

Thus, the plaintiff is presently in an unenviable position in which daily penalties for noncompliance with the state implementation plan are accruing while it seeks variances pursuant to the statutorily authorized procedure contained in V.A.M.S. § 203.110. Additionally, Union Electric's first mortgage and deed of trust (Plff's Ex. 7), under which $1,078,000,500 principal amount of its bonds are outstanding, provide that the failure of Union Electric to comply with any governmental directives could constitute an act of default and make all such bonds callable. A calling of all bonds could force the plaintiff into bankruptcy.

Immediate compliance with the applicable regulations is not possible. The testimony before the Court indicated that the only way compliance with the SO_2 regulation could be achieved at those plants would be by the installation of flue gas desulphurization (FGD) equipment or by the use of low sulphur coal. The installation of FGD equipment on those plants would require a capital expenditure over the next four to five years of over $713,000,000 and annual operating costs of $137,000,000 as of the assumed 1983 start-up year. Such equipment would not produce any electricity. The construction of such equipment would require at least five years at Union Electric's

plants. Additionally, testimony indicated that FGD equipment cannot be relied on, even with the best of maintenance, to operate continually or satisfactorily. As stated by Justice Powell, *UE v. EPA*, supra, 427 U.S. at 271 n. 2, 96 S.Ct. at 2532, "[T]he burden of these extraordinary capital and operating costs, even if the technological infeasibility problems could be solved, would fall necessarily on the consumers of electric power."

The annual cost of low sulphur coal over that now being used at the Labadie and Sioux plants would be almost $179,000,000 plus capital investment of $49,000,000. This would cause a rate increase of approximately twenty-five percent if there were no decrease in the use of electricity. Further, testimony indicated that it is presently impossible to obtain a sufficient supply of low sulphur coal to meet the SO_2 emission regulation.

Compliance could be achieved only by a shutdown of its plants. The Labadie and Sioux plants alone constitute more than fifty percent of the base generating capacity of the plaintiff. A shutdown of these plants could result in a widespread electrical breakdown throughout the Midwest and would result in drastic financial consequences to the plaintiff. Justice Powell in *UE v. EPA*, supra at 272, 96 S.Ct. at 2532, said:

> "[T]he shutdown of an urban area's electrical service could have an even more serious impact on the health of the public than that created by a decline in ambient air quality. The result apparently required by the legislation [Clean Air Act] in its present form could sacrifice the well-being of a large metropolitan area through the imposition of inflexible demands that may be technologically impossible to meet and indeed may no longer even be necessary to the attainment of the goal of clean air.
>
> "I believe that Congress, if fully aware of this draconian possibility, would strike a different balance."

Further, it is conceivable that a voluntary shutdown by the plaintiff would violate its statutory duty to provide such service facilities as shall be safe and adequate, and in all respects just and reasonable. V.A.M.S. § 393.130.1. The Missouri Public Service Commission has held that a public utility may not abandon service except for sound and equitable reasons after a fair and reasonable trial at operation. 6 Mo.P.S.C. 681.

[1,2] At the outset it is important to note that the general function of a preliminary injunction is to maintain the status quo pending determination of the action on its merits. *Blaylock v. Cheker Oil Co.*, 547 F.2d 962, 965 (6th Cir. 1976). The traditional requirements necessary for the grant of a temporary injunction are: (1) Irreparable harm to the petitioner unless preliminary relief is granted; (2) absence of substantial harm to the opposing party; (3) absence of harm to the public interest; and (4) a likelihood that the petitioner will prevail on the merits of his case. See *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975); *Mo. Portland Cement Co. v. H. K. Porter Co.*, 535 F.2d 388, 392 (8th Cir. 1976); *Washington v. Walker*, 529 F.2d 1062, 1065 (7th Cir. 1976); *A. O. Smith Corp. v. FTC*, 530 F.2d 515, 525 (3rd Cir. 1976); *Canal Authority v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). These requirements have undisputably been met in the present case.

[3] Plaintiff has established irreparable harm through the potential calling of its bonds, which could force plaintiff into bankruptcy, and the threatened enforcement of daily accumulating criminal and civil penalties, including an injunction not to violate the regulation which could only be accomplished by closing the plant, under 42 U.S.C. § 7413(b) and (c). *Abbott Laboratories v. Gardner*, 387 U.S. 136, 152-56, 87 S.Ct. 1507, 18 L. Ed.2d 681 (1967); *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 99-100, 69 S.Ct. 968, 93 L.Ed. 1231 (1949).

The injury to the defendant is not substantial, and is certainly outweighed by the injury to the plaintiff. Indeed, as previously referred to, Jerome H. Svore, the Regional Administrator for the EPA, in a letter (Plff's Ex. 3) to the Chairman of the Missouri Air Quality Commission, conceded that the UE's Sioux and Labadie plants do not violate NAAQS for SO_2 and that the EPA would be amenable to a revision of state standards by the Missouri Air Conservation Commission. The plaintiff is in violation of the implementation plan only because Missouri standards exceed those necessary for compliance with the National Standards (NAAQS), as the states are free to adopt stricter standards than the national standards under § 116 of the Clean Air Act, 42 U.S.C. § 1857d-1 (1970 Ed. Supp. IV). See also *UE v. EPA*, supra, 427 U.S. at 261-66, 96 S.Ct. 2518.

The public interest is manifestly in favor of continued operation by the plaintiff. *UE v. EPA*, supra at 272, 96 S.Ct. 2518 (Powell concurring).

In *American Home Products Corp. v. Finch*, 303 F.Supp. 448, 456 (D.Del.1969), it was held that a substantial likelihood of success need not be demonstrated where:

> "The question is not of court interference with 'ordinary processes of administration' pending judicial review, but rather one of insuring the functioning of the 'ordinary processes of administration' necessary to protect the procedural rights of the plaintiff and prevent irreparable injury to him. Further, in contrast to a determination of probable success on appeal, this Court does not possess the necessary expertise to determine, in advance of a hearing before the appropriate administrative body, whether the plaintiff will have a 'substantial likelihood of success' before that body."

In the present case, the petitioner does not request this Court to determine the merits of its request for a variance. Rather,

it seeks only a maintenance of the status quo while pursuing administrative and/or judicial procedures, to which it is statutorily authorized under V.A.M.S. § 203.110 et seq. The decision in *American Home Products*, supra, would thus be applicable, however this Court is not compelled to rely upon it. The magnitude of the injury posed to the public and the petitioner, the absence of any violation of national standards, and the previous grants of variances by the Missouri Air Conservation Commission indicate a substantial likelihood of success here. The Court doubts that the Commission would require the shutdown of a regional power company, with the subsequent devastating effects on this area to achieve air quality standards that have specifically been determined unnecessary by EPA.

The plaintiff principally argues that it is entitled to a stay of enforcement proceedings while it is pursuing in good faith state procedures for a change in regulations or a variance as a matter of procedural process, citing *Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908). Therein the Supreme Court held that state statutes establishing maximum rail rates and providing for daily accumulating penalties, including imprisonment for violation thereof, were constitutionally invalid, since the parties have been given no opportunity to contest the validity of the rates, and were effectively denied judicial review of the rates by the magnitude of the penalties.

> "Now to impose upon a party interested in the burden of obtaining a judicial decision of such a question (no prior hearing having ever been given) only upon the condition that, if unsuccessful, he must suffer imprisonment and pay fines, as provided in these acts, is, in effect, to close up all approaches to the courts, and thus prevent any hearing upon the question whether the rates as provided by the acts are not too low, and therefore invalid. The distinction is obvious between a case where the validity of the act depends upon the existence of a fact which can

be determined only after investigation of a very complicated and technical character, and the ordinary case of a statute upon a subject requiring no such investigation, and over which the jurisdiction of the legislature is complete in any event."

Ex Parte Young, supra at 148, 28 S.Ct. at 449. Accord. *Wadley Southern Ry. v. Geogia*, 235 U.S. 651, 669, 35 S.Ct. 214, 59 L.Ed. 405 (1915).

In *St Regis Paper Co. v. United States*, 368 U.S. 208, 82 S.Ct. 289, 7 L.Ed.2d 240 (1961), the Supreme Court held that daily accumulating penalties for failure to file special reports in compliance with FTC orders were not invalid where "petitioner did not try to obtain judicial review prior to the commencement" of the government's enforcement action, and where the petitioner did not "seek a stay once the litigation had begun." *St. Regis Paper Co. v. United States*, supra, at 225, 82 S.Ct. at 299. See also *United States v. Morton Salt Co.*, 338 U.S. 632, 654, 70 S.Ct. 357, 94 L.Ed. 401 (1950); *United States v Pacific Coast European Conference*, 451 F.2d 712 (9th Cir. 1971); *Genuine Parts Co. v. F. T. C.*, 445 F.2d 1382 (5th Cir. 1971). This line of cases holds that a party whose conduct is made subject to administrative action must be given an opportunity to obtain a judicial test of the validity of such action and, as a matter of due process of law, cannot be subjected to the risk that substantial penalties will accumulate during the course of the judicial proceeding

[4] The plaintiff is presently pursuing the only method by which it can achieve compliance with state standards without violating its statutory duty to provide service. V.A.M.S. § 393.-130.1. Persons seeking to relax state emission standards more stringent than those required by the National Standards must obtain their relief from the state. *UE v. EPA*, supra, at 263 n. 10, 265 n. 14, 96 S.Ct. 2518.

[5-7] Due process requires a full and fair hearing before an impartial tribunal "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). See also *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970). A hearing which comports with due process requirements must ordinarily be accorded before a party "can be condemned to suffer a grievous loss." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168, 71 S.Ct. 624, 647, 95 L.Ed. 817 (1951) (Frankfurter concurring). The Court concedes that there is little precedent in the environmental area for its decision herein due to the relative newness of the Clean Air Act. However, the enforcement of certain orders by the Food and Drug Administration have been temporarily stayed, upon considerations of procedural due process, until a hearing before that agency on the merits of the case, where the petitioner presented reasonable grounds for objecting to the order and also established the traditional requirements for a temporary injunction. *American Home Products Corp. v. Finch*, 303 F. Supp. 448 (D.Del. 1969). See also *Upjohn Co. v. Finch*, 303 F.Supp. 241 (W.D.Mich. 1969). This Court concludes that as a matter of procedural due process, as guaranteed by the 5th Amendment, the plaintiff is entitled to seek a variance under state proceedings prior to the institution of enforcement proceedings.

[8] The Clean Air Act, 42 U.S.C. § 7401 et seq. (1977 amendments) has delegated a considerable amount of responsibility to the states for achieving its purposes and goals. See *Luneburg, Federal-State Interaction Under the Clean Air Amendments of 1970*, 14 B.C.Ind. & Com.L.Rev. (1973). The 1970 amendments reflect congressional dissatisfaction with the progress of existing air pollution programs and a determination to "take a stick to the States." *Train v. Natural Resources Defense Council*, 421 U.S. 60, 64, 95 S.Ct. 1470, 1474, 43 L.Ed. 2d 731 (1975). The states are required to formulate, subject

to EPA approval, an implementation plan designed to achieve national ambient air quality standards. 42 U.S.C. § 7410(a)(1). The states are further permitted to go beyond national standards by enacting more strict state standards. *UE v. EPA*, supra at 261-65, 96 S.Ct. 2518. The states may also enact a procedure to revise its plan. 42 U.S.C. §§ 7410(a)(3)(A), 7410(a)(5)(A)(iii). A variance approved as a revision of a plan under § 110(a)(3)(A) of the Act, 42 U.S.C. § 7410(a)(3)(A) must be honored by the EPA as part of the applicable implementation plan. *UE v. EPA*, supra at 266 n. 15, 96 S.Ct. 2518. It would be incongruous to permit the EPA to pursue enforcement while a variance is being sought as to a state standard, especially in light of the magnitudinous irreparable harm posed to the plaintiff as heretofore discussed. Assuming that a variance is granted, the EPA will find itself enforcing or having enforced a regulation that is no longer in effect.

Indeed, it has been interpreted that an application for a variance under the provisions of V.A.M.S. § 203.110 stays enforcement of the regulation at issue as to the person filing the petition. Op. (Mo.) Atty. Gen. No. 281, Shell, 4-14-70. It should also be noted that the members of the Missouri Air Conservation Commission are statutorily required to be "persons experienced in the field of air pollution," and hence the commission may constitute a more knowledgeable forum than any court of law. V.A.M.S. § 203.040.1.

The cases cited by the defendant are inapposite. The EPA relies upon *Lloyd A. Fry Roofing Co. v. EPA*, 554 F.2d 885 (8th Cir. 1977). Therein, the plaintiff sought pre-enforcement review of the EPA's Notice of Violation and Compliance Order, challenging their validity and merits. Here, no compliance order has been issued and plaintiff seeks only a stay of enforcement proceedings until it has exhausted its request for a variance, which can only be obtained under state law. *UE v. EPA*, supra. This same consideration is applicable to *West Penn Power Co.*

v. Train, 522 F.2d 302 (3rd Cir. 1975). The Court in *Fry* was particularly concerned that "[p]re-enforcement review would severely limit the effectiveness of the conference procedure as a means to abate violations of the Act without resort to judicial process." *Lloyd A. Fry Roofing Co. v. EPA*, supra at 891. The 1977 amendments to the Clean Air Act effectively dispose of the consideration by requiring the commencement of a civil action against any operator of a major stationary source for violations occurring thirty days after notification by the Administrator. 42 U.S.C. § 7413(b)(2)(B). The Court of Appeals also stated, l.c. 891:

> "[W]e are persuaded by the legislative history of the Clean Air Act amendments of 1970 to hold that plaintiff lacks authority to initiate and maintain litigation to challenge the EPA's order issued on March 9, 1976, and that plaintiff must assert its claims as a defense or counterclaim in any action brought by the Administrator of EPA under section 113 of the Clean Air Act. 42 U.S.C. § 1857c-8."

However, the Supreme Court in *UE v. EPA*, supra at 266-7, 96 S.Ct. 2518, clearly established that claims of economic and technological infeasibility may be raised in state proceedings.

The defendant also places considerable reliance upon a statement contained in *Train v. NRDC*, 421 U.S. 60, 92, 95 S.Ct. 1470, 1488, 43 L.Ed.2d 731 (1975). Therein, the Court stated:

> "As made clear in the *Getty* case [*Getty Oil Co. v. Ruckelshaus*, 342 F.Supp. 1006 (D.Del.), remanded with directions, 467 F.2d 349 (3rd Cir. 1972)] * * * a polluter is subject to existing requirements until such time as he obtains a variance, and variances are not available under the revision authority until they have been approved by both the State and the Agency. Should either entity determine that granting the variance would prevent attainment or

maintenance of national air standards, the polluter is presumably within his rights in seeking judicial review. This litigation, however, is carried out on the polluter's time, not the public's, for during its pendency the original regulations remain in effect, and the polluter's failure to comply may subject him to a variety of enforcement procedures."

Initially, it should be noted that the *Getty* case has overruled in *UE v. EPA*, supra at 254, 96 S.Ct. 2518. Secondly, this Court deems it unlikely that the statement made above was intended to preclude the exercise of this Court's equitable powers in the face of extraordinary irreparable harm, without an express intent to that effect. Third, the plaintiff herein seeks only a stay of enforcement proceedings by the EPA until pending state processes are exhausted.

[9] In conclusion this Court holds:

(1) That considerations of procedural due process require that the plaintiff be permitted to seek a variance under state procedures prior to suffering a grievous loss which may result from an enforcement proceeding by the EPA;

(2) That this Court under its general equitable powers has the authority to stay an enforcement proceeding to prevent irreparable harm while the plaintiff seeks in good faith a variance under State procedures; and

(3) That the only fair interpretation of the Clean Air Act, where an enforcement proceeding may be instituted while the polluter is seeking a variance of the state implementation plan, is to allow the variance proceeding to go first with any enforcement action to follow.

Accordingly, pending final determination of this litigation, but in no event beyond the final determination of the plantiff's pending request for a revision variance of the applicable Missouri

Implemenation Plan, the defendant, Environmental Protection Agency, and its officers and employees, are hereby enjoined from instituting any enforcement proceedings against the plaintiff, Union Electric, and/or its responsible officers while Union Electric is actively and in good faith pursuing a revision or variance of the sulphur dioxide regulations of the Missouri Implementation Plan in the administrative agencies and/or courts of the State of Missouri pursuant to V.A.M.S. §§ 203.110 and 203.130.

This preliminary injunction is granted on the condition that plaintiff post within three (3) days a bond in the amount of $500,000.00 for the payment of such costs and damages as may be incurred or suffered by the defendant if it is found to have been wrongfully enjoined or restrained.

No. 78-1844

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNION ELECTRIC COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1844

UNION ELECTRIC COMPANY, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-18) is reported at 593 F. 2d 299. The opinion of the district court (Pet. Supp. App. SA-1 to SA-23) is reported at 450 F. Supp. 805.

JURISDICTION

The amended judgment of the court of appeals (Pet. App. A-19) was entered on February 20, 1979. A petition for rehearing was denied on March 15, 1979 (Pet. App. A-20). The petition for a writ of certiorari was filed on June 11, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a source of air emissions that has received a notice of violation under Section 113(a) of the Clean Air Act, 42 U.S.C. 1857c-8(a), may maintain an action to enjoin the Environmental Protection Agency from enforcing the emission limitations that allegedly have been violated.

STATEMENT

Petitioner's three coal-fired electric generating plants are subject to sulfur dioxide and opacity restrictions under the Missouri Implementation Plan, adopted under the Clean Air Act, 42 U.S.C. 1857 *et seq.*,[1] and approved by the Environmental Protection Agency in May 1972 (Pet. App. A-3). Cf. *Union Electric Co.* v. *EPA*, 427 U.S. 246 (1976). Under Section 113(a) of the Act, 42 U.S.C. 1857c-8(a), the EPA notified petitioner in January 1978 that the restrictions applicable to two of the three generating plants were being violated. At the time petitioner received this notice of violation, it was attempting, in administrative proceedings before the Missouri Air Conservation Commission, to secure a variance in the sulfur dioxide standards applicable to its plants.

After receiving the notice of violation, petitioner filed this action in the United States District Court for the Eastern District of Missouri. The complaint sought a stay of any enforcement proceedings that the EPA might conduct, pending completion of the state administrative proceeding in which petitioner was engaged. The district

[1] As a consequence of the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, 91 Stat. 685, the Act will be recodified at 42 U.S.C. 7401 *et seq.*

court granted the relief requested. The court enjoined the EPA from instituting any enforcement proceeding against petitioner while petitioner was "actively and in good faith pursuing a revision or variance of the sulphur dioxide regulations of the Missouri Implementation Plan in the administrative agencies and/or courts of the State of Missouri" (Pet. Supp. App. SA-23).

While the EPA's appeal from the preliminary injunction was pending, the Missouri Air Conservation Commission granted petitioner's requested variance in the sulfur dioxide standards. A petition to review that variance is now pending in the Missouri state courts.

The variance granted by the Missouri Air Conservation Commission applied only to sulfur standards; petitioner did not seek, and the Commission did not grant, a variance with respect to the opacity standards applicable to petitioner's electric generating plants. Nor did the district court's preliminary injunction stay enforcement proceedings concerning petitioner's alleged violation of the opacity regulations (see Pet. App. A-11 n.5). The sulfur dioxide variance granted by the Commission cannot become effective until approved by the EPA (see Pet. App. A-7 n.2), and the EPA has not yet decided whether to grant such approval.

In September 1978, while the appeal from the preliminary injunction was still pending, the EPA advised petitioner that "notwithstanding any decision by the Eighth Circuit Court of Appeals to vacate the preliminary order of the District Court, the EPA will not initiate any enforcement proceedings against [petitioner] relative to violations of the federally approved sulfur dioxide regulation until EPA, Region VII has informed [petitioner] in writing of its decision regarding a recommended approval or disapproval of the variance,

which would of course be followed by a notice of proposed rulemaking and public comment period" (Reply Br. for the EPA, App. B at 48; see Pet. App. A-16 n.8).

The court of appeals reversed the district court's decision and dismissed petitioner's complaint. The court held that "federal courts should not interfere with the pre-enforcement procedures established by the [Clean Air] Act to obtain compliance" (Pet. App. A-13). The court stated that petitioner's grievances, including any claims of economic and technological infeasibility, could be raised in future enforcement proceedings, but could not provide a basis for enjoining the EPA's enforcement efforts (Pet. App. A-16 to A-17).

ARGUMENT

The decision below is correct and does not conflict with *Ex parte Young*, 209 U.S. 123 (1908). Petitioner has not been deprived of due process and, indeed, the ruling of the court of appeals is unlikely even to cause petitioner any inconvenience. Further review is not warranted.

A notice of violation is the statutorily required first step in a process designed to secure compliance with the emission limitations of the State Implementation Plans promulgated under the Clean Air Act. The sole issue raised in this litigation, and the sole issue decided by the court of appeals, is whether a party receiving a notice of violation is entitled to maintain a suit to enjoin the EPA from proceeding with enforcement of the standards that allegedly have been violated. The court of appeals' decision, that injunctive relief is not available at this early stage of the enforcement process, was correct, for the reasons set forth in the court's opinion.

No question of due process is raised by this case. The State of Missouri has granted a variance in the sulfur

dioxide emissions permissible under the State Implementation Plan, and the EPA's regional office, which must decide whether to recommend approval of the variance, has voluntarily undertaken not to bring any enforcement action against petitioner until that decision is made. If the variance is approved, the EPA will take no further action concerning petitioner's sulfur dioxide emissions (assuming, of course, that those emissions meet the standards set forth in the variance).

On the other hand, if the EPA's regional office recommends disapproval of the variance, then petitioner will remain free to raise its arguments concerning economic and technological infeasibility in any enforcement proceeding that may ensue. Apparently because the EPA retains the power to enforce the emission limitations contained in the State Implementation Plan, petitioner raises the spectre of *Ex parte Young*, *supra*, and contends (Pet. 10-12) that, before it runs the risk of incurring further liability under the Clean Air Act, it is entitled to challenge the validity of the limitations imposed by the Missouri plan. But, as this Court observed in *Union Electric Co.* v. *EPA*, 427 U.S. 246, 266 (1976), Congress intended that judicial consideration of claims of economic and technological infeasibility under the Act should occur only when it "will not substantially interfere with the primary congressional purpose of prompt attainment of the national air quality standards." The Court suggested that such claims could be resolved most expeditiously before the state agency formulating the implementation plan[2] or on judicial review of the plan and its exemptions in state court (*id.* at 266-267).

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[2]Missouri law requires the State Air Conservation Commission to use only "practical and economically feasible methods" in controlling air pollution. This limitation covers all the Commission's activities, including its work in devising an implementation plan under the

Here, Missouri law provided petitioner with an opportunity to challenge the State Implementation Plan, but petitioner failed to take advantage of the statutory procedure for obtaining judicial review. See Mo. Ann. Stat. §203.130 (Vernon 1972) and §536.050 (Vernon 1953). *Ex parte Young*, *supra*, is therefore distinguishable; the premise of the Court's holding in that case was that the railroads could not obtain review of Minnesota's rate regulation legislation without violating the statute and thereby risking severe penalties. As the Second Circuit has explained:

> *Young* [and cases following it] * * * establish that one has a due process right to contest the *validity* of a legislative or administrative order affecting his affairs without necessarily having to face ruinous penalties if the suit is lost. The constitutional requirement is satisfied by a statutory scheme which provides an opportunity for testing the validity of statutes or administrative orders without incurring the prospect of debilitating or confiscatory penalties.

Brown & Williamson Tobacco Corp. v. *Engman*, 527 F. 2d 1115, 1119 (2d Cir. 1975), cert. denied, 426 U.S. 911 (1976).

The harshness of the choice confronting the railroads in *Young* is simply not present here. In addition to the opportunity for advance negotiation with the state agency responsible for the implementation plan and in addition to the Missouri statutory procedure for judicial review of the agency's decision, the variance mechanism that

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Clean Air Act. Mo. Ann. Stat. §203.030 (Vernon 1972). In addition, Missouri law provides that the Commission may adopt no "standard, rule or regulation" without first holding a public hearing in accordance with Mo. Ann. Stat. §203.070 (Vernon 1972).

petitioner has already used and the remedial discretion lodged in the EPA inject ample flexibility into the regulatory scheme. As this Court noted in *Union Electric* v. *EPA*, *supra*, 427 U.S. at 268:

> When a source is found to be in violation of the state implementation plan, the Administrator may, after a conference with the operator, issue a compliance order rather than seek civil or criminal enforcement. Such an order must specify a "reasonable" time for compliance with the relevant standard, taking into account the seriousness of the violation and "any good faith efforts to comply with applicable requirements." §113(a)(4) of the Clean Air Act, as added, 84 Stat. 1686, 42 U.S.C. §1857c-8(a)(4). Claims of technological or economic infeasibility, the Administrator agrees, are relevant to fashioning an appropriate compliance order under §113(a)(4).

Finally, of course, judicial review of the economic and technological feasibility of particular emission limitations may be available in any civil or criminal enforcement action that the EPA chooses to pursue. See *Indiana & Michigan Electric Co.* v. *EPA*, 509 F. 2d 839, 847 (7th Cir. 1975); *Buckeye Power, Inc.* v. *EPA*, 481 F. 2d 162, 173 (6th Cir. 1973) (both indicating that infeasibility arguments can be considered in enforcement proceedings). See also *Union Electric Co.* v. *EPA*, *supra*, 427 U.S. at 268 n.18 (explicitly refusing to address the question whether claims of economic or technological infeasibility may be raised as a defense in an EPA enforcement proceeding). Indeed, in *Union Electric* v. *EPA*, *supra*, where petitioner argued that claims of economic or technological infeasibility should be cognizable on review of the EPA's decision to approve a state implementation plan, petitioner conceded that all due process re-

quirements would be satisfied if such claims could be raised as a defense in an enforcement action (Pet. Br. 31 (No. 74-1542)).

The court of appeals' decision in the present case does nothing more than free the EPA to fulfill its statutory obligation to enforce the Clean Air Act. No penalties of any kind have yet been imposed on petitioner, and the court of appeals' ruling does not mean that petitioner's infeasibility arguments cannot be asserted in any future enforcement proceeding that the EPA may conduct. Further review is inappropriate at this stage.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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PETITIONER'S REPLY TO BRIEF FOR THE ENVIRONMENTAL PROTECTION AGENCY IN OPPOSITION

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In this reply we direct our attention to new material in the Environmental Protection Agency (EPA) brief, which is significant and either factually or legally inaccurate. And in doing so we divide our reply between the three headings on pages 2 et seq. of such brief.

QUESTION PRESENTED

The EPA has abbreviated its statement of the question presented so as to exclude the facts in this case which give rise

to the constitutional issue. Thus the EPA's emasculated statement would be correct if it were qualified and followed by these facts

> "(1) when by such enforcement the source and its responsible corporate officers incur the risk of severe and confiscatory civil and criminal penalties, (2) when the source is legally testing the validity of the application to it of those emission limitations and (3) when the source's actual emissions present no danger to the public health or welfare—indeed when, as here, it is admitted by all parties that such actual emissions do not impair the maintenance of National Ambient Air Quality Standards."

As so qualified the question presented is an accurate and fair one. As emasculated by the EPA, it is neither.

STATEMENT

While the EPA's statement is not wholly correct, the inaccuracies are principally factual omissions revolving around the EPA's refusal (as stated in the preceding section of this brief) to recognize the existence of those facts which give rise to an important constitutional question. Since these facts have been stated in our Petition for Certiorari (pp. 2 et seq.), we do not believe this Court should consider itself impeded by any lack of them in resolving our certiorari request.

ARGUMENT

Respondent EPA commences its argument by stating that "the ruling of the court of appeals is unlikely even to cause petitioner any inconvenience" (p. 4 of EPA brief). The apparent basis for this statement is the September 1978 letter from the "Director, Enforcement Division, EPA Region VII" to Petitioner, which said, among other things, that "EPA will not initiate any enforcement proceedings against (Petitioner) relative to violations of the federally approved sulfur dioxide regulation until EPA, Region VII has informed (Petitioner) in writing of its decision regarding a recommended approval or disapproval of the variance, which would of course be followed by a notice of proposed rulemaking and public comment period."[1]

Although the EPA characterizes its non-enforcement letter as "voluntary," it should be pointed out that at the time it was written a Federal District Court order prohibited enforcement and since that time the issue has been in litigation before the federal courts. The "stay" granted by the EPA is illusory because it could be revoked at any time (and probably would be if the issue was not in litigation).

The Clean Air Act Amendments of 1977 (42 U.S.C. Section 7413) authorize the EPA Administrator to seek civil and criminal penalties 30 days after notifying a party of alleged violations. Petitioner has been notified and the 30 days have expired. The "stay" can be revoked at any time and Petitioner will be liable from that date forward to draconian penalties prescribed by the Amendments. Due process of law should not be dependent upon the whim of the EPA Administrator.

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[1] See pages 3-4 of EPA brief.

It is apparent that the EPA staff does not intend to adhere to the fundamental rights of due process. In its nonenforcement letter, the EPA staff states that the "stay" would continue only until it makes a recommendation, not until a final decision is made. It is willing to subject the Petitioner to the severe penalties prescribed by the Amendments before the decision making process is complete.

Issuance of the "notice of violation" in January 1978 commenced the process prescribed under the Clean Air Act Amendments. It is imperative that the Petitioner not be subject to the whim of the EPA in deciding when it will commence enforcement actions. A judicially-enforceable stay is required by the holding in *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908). The constitutional protection recognized by this Court in that case is against the risk of incurring severe and confiscatory fines and penalties, when, as here, petitioner and its officers must pass upon the question at their own risk.[2]

On page 5 of its brief the EPA refers to this Court's observation in *Union Electric v. EPA*, 427 U.S. 246, 266 (1976) that

> "Congress intended that judicial consideration of claims of economic and technological infeasibility under the Act should occur only when it 'will not substantially interfere with the primary congressional purpose of prompt attainment of the national air quality standards'."

But as we have previously pointed out, consideration of such claims in the instant case will not interfere in any respect with the congressional purpose of attainment (or of maintenance for that matter) of national air quality standards. This is necessarily true, since all parties admit that a continuance of

[2] See *Wadley Southern R. Co. v. Georgia*, 235 U.S. 651, 35 S.Ct. 214, 218 (1915) and the quotation therefrom on p. 10 of the Pet. for Cert.

present SO_2 emissions will not interfere, substantially or otherwise, with the maintenance of such standards.

Unquestionably the most mystifying aspect of this case is the establishment and enforcement as federal law of emission limitations which are not geared to national air quality standards, but which are mandated by states and which may satisfy any state whim.[3] We respectfully submit that the U.S. Constitution, and this Court's interpretation of it in *Ex parte Young*, cited supra, demand the striking of a better balance.

On page 6 of its brief, the EPA says:

> "Here, Missouri law provided petitioner with an opportunity to challenge the State Implementation Plan, but petitioner failed to take advantage of the statutory procedure for obtaining judicial review."

This statement is rather cryptic to us, since at the time this suit was filed and for some time prior thereto petitioner had been seeking a variance from the Missouri Air Commission as to its Labadie and Sioux Plants. And in the *Union Electric* case, cited supra, this Court specifically held that such a procedure was an appropriate method to obtain relief from emission regulations (427 U.S. at 266). This Court also there pointed out (n. 15 at p. 266) that a variance is approvable by the EPA as a revision of the State Implementation Plan.[4]

Although the EPA brief does not say so, perhaps it obtusely refers to the fact that after its May, 1972 approval of the Mis-

[3] In fact, if the EPA and the Court of Appeals are correct, a state can ban all emissions and the Federal Government must enforce with Draconian penalties such ban as valid and constitutional federal law.

[4] Our mystification is intensified by the fact (p. 3 of EPA brief) that the Missouri Air Commission has in fact granted the variance, and any delay rests with the EPA.

souri Implementation Plan, Union Electric sought variances as to its particular plants rather than a review of the State Plan in the Missouri Courts. Contrary to the EPA we have doubt that such a review is permissible. Thus we find no authority that the State Commission's promulgation of the plan constitutes an "administrative decision" under Section 203.130, R.S.Mo., 1978. In any event a possibility of state review really makes no difference. The Clean Air Act (42 U.S.C. Section 7410) contains no provision, nor does it contemplate, that the EPA shall withhold approval of the plan, while the propriety of its application to one source or another goes through a state appellate procedure. In view of the fact that the Administrator must act on the plan within four months after its submission (42 U.S.C. Sec. 7410(a)(2)) it is certainly unrealistic to think that a state appellate process would inevitably, or even often, be completed by that time. We also point out that since the Clean Air Act Amendments of 1970 and the Implementation plan approval in 1972, the facts with respect to energy have vastly changed, and justice requires governmental agencies and courts alike to recognize and deal with those facts.

In conclusion we note that the Attorney General's office has sought succor in statements we made in our brief filed in the earlier *Union Electric* case. But the constitutional question presented in that case had nothing to do with the *Ex parte Young* doctrine we present here; and additionally the Court there declined to consider the constitutional point we presented (427 U.S. at p. 269, n. 19).

CONCLUSION

The EPA and its counsel refer to the "spectre" of *Ex parte Young* as if it were a constitutional doctrine which must somehow be forgotten. But we respectfully submit that that doctrine, which is so clearly applicable here, cannot be abrogated, changed or modified by any governmental agency or department or any court of appeals. Nor can it be eliminated or changed by refusals to grant certiorari in cases where it is presented. We therefore respectfully pray that our petition for certiorari be granted.

Respectfully submitted,

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